

VOLUNTEER PRACTISING CERTIFICATES IN SOUTH AUSTRALIA

JusticeNet SA submission regarding a proposed new category of practising certificates for volunteer lawyers who provide only pro bono services

EXECUTIVE SUMMARY

- JusticeNet SA operates a pro bono referral service for low-income and disadvantaged individuals.
- The Attorney-General of South Australia has suggested that the Legal Practitioners Education and Admission Council (**LPEAC**) make rules constituting a category of practising certificate for volunteer lawyers who provide only pro bono services (in this submission referred to as **volunteer practising certificates**).
- JusticeNet supports the proposal and makes some observations about what any system of volunteer practising certificates might most appropriately involve.
- In particular, JusticeNet considers that free volunteer practising certificates would provide the best incentive for individuals to provide pro bono legal services.
- Volunteer practising certificates should be available more broadly so as to include legal practitioners who engage in legal practice only as a volunteer on a pro bono project approved by the Australian Pro Bono Centre (**APBC**) as well as to volunteers at Community Legal Centres.
- It is noted that the Queensland scheme for free volunteer practising certificates was recently identified by the Productivity Commission as the preferred model. The Queensland scheme provides for holders of volunteer practising certificates to undertake pro bono legal work on projects approved by the APBC, which can also provide professional indemnity insurance without charge under the National Pro Bono Professional Indemnity Insurance Scheme.
- Volunteer practising certificates should also be available to practitioners who have not completed supervised practise within the meaning of rule 3 of the



LPEAC rules. This would give new practitioners more opportunities to undertake (supervised) pro bono work, while ensuring there is no risk that volunteer practising certificates are used to complete supervised practice within the meaning of the LPEAC rules (because volunteer practising certificates can only be used by volunteers at CLCs or on APBC approved projects).

- JusticeNet agrees that holders of volunteer practising certificates should be required to comply with the mandatory Continuing Professional Development regime established by the LPEAC rules. This will serve as a measure to robustly ensure professional integrity among holders of volunteer practising certificates.
- JusticeNet does not consider that it would be necessary to extend volunteer practising certificates to university staff who are engaged as supervising solicitors for legal assistance clinics. This is because such university staff members are not volunteers, but are engaging in legal practice as part of their paid employment.



1. ABOUT JUSTICENET SA

- 1.1. JusticeNet SA provides pro bono legal services for low-income and disadvantaged individuals. JusticeNet connects eligible applicants with volunteer lawyers in public and private practice who help free of charge on a referral basis or via our Self-Representation Services.
- 1.2. In its Final Report on the recent Access to Justice Arrangements Inquiry, the Productivity Commission acknowledged the importance of pro bono in bridging the access to justice gap.¹ In 2014 JusticeNet provided pro bono legal help to over 200 individuals experiencing civil law problems who could not obtain assistance elsewhere.
- 1.3. JusticeNet has long advocated for the creation of free volunteer practising certificates. Our interest in the proposal is twofold. First, a system of volunteer practising certificates would create opportunities for people to contribute their time and services to Community Legal Centres (**CLCs**) such as JusticeNet. Secondly, because of the nature of the services it provides, JusticeNet has a general interest in promoting the growth of pro bono legal services in South Australia.

2. BARRIERS TO PROVISION OF PRO BONO SERVICES BY VOLUNTEERS

- 2.1. Under s 21(1) of the *Legal Practitioners Act 1981 (SA) (LPA)*, a person must not practise law unless they are a local or interstate legal practitioner, which requires the person to hold a practising certificate. The maximum penalty for breaching s 21 is a fine of \$50,000.
- 2.2. Section 21(3) of the LPA clarifies that s 21(1) does not prevent various types of conduct (for example, certain services typically provided by law clerks and conveyancers). However, none of those exemptions would allow a person to provide pro bono legal services on a volunteer basis.
- 2.3. Accordingly, a person who wishes to do so must pay (or seek to have the organisation for which they are proposing to volunteer pay) the current fee for the issue of a practising certificate in South Australia, which is \$572. This places a substantial burden on individuals who wish to volunteer their skills and experience, or the organisations for whom they would volunteer.

¹ Australian Government Productivity Commission, Commonwealth of Australia, *Access to Justice Arrangements Productivity Commission Inquiry Report* (2014) p 639.



Alternatively, individuals might decide not to volunteer their time, or organisations might decide not to seek out their services.

3. PROPOSAL

- 3.1. The Attorney-General of South Australia has suggested that LPEAC make rules constituting a category of practising certificate for volunteer lawyers who provide only pro bono services (volunteer practising certificates).
- 3.2. JusticeNet supports the suggestion. We have been advised by the Attorney-General that the purpose of the 2013 amendments to the LPA giving LPEAC the power to prescribe different categories of practising certificates was precisely to provide for the creation of volunteer practising certificates.
- 3.3. JusticeNet supports the creation of volunteer practising certificates because they would encourage and facilitate people who are qualified to practise law to volunteer their time and skills in service to the community, and for the benefit of:
 - 3.3.1 Community Legal Centres (including JusticeNet), or any other organisations for whom those volunteers would work;
 - 3.3.2 the community generally, but especially low income and disadvantaged members of the community, who benefit most from the work of Community Legal Centres and pro bono legal services; and
 - 3.3.3 the volunteers themselves, by removing barriers that might otherwise prevent them from offering their time and skills in a meaningful and rewarding way.
- 3.4. Free volunteer practising certificates are currently available in four other Australian states: New South Wales², Victoria³, Queensland⁴ and Western Australia⁵. The steadily increasing number of volunteer practising

² The provisions on practising certificates contained in the Legal Profession Uniform Law, which will come into effect on or about 1 July 2015 in New South Wales and Victoria, include a category of practice “as a volunteer at a community legal centre, or otherwise on a pro bono basis only”. In practice this means that NSW, Victoria, Queensland and Western Australia will all offer volunteer practising certificates.

³ See s 2.2.2, 2.4.3, 2.4.9, 3.5.4A of the *Legal Profession Act 2004* (Vic).

⁴ See s 53 of the *Legal Profession Act 2007*, Rules 12A, 12B, 15A, 15B of the Queensland Law Society Administration Rule 2005.

⁵ See s 47(3)(i) of the *Legal Profession Act 2008* (WA).



certificates being issued in those states demonstrates that they are effective in increasing the provision of pro bono legal services.

3.5. JusticeNet recommends that LPEAC create a category for volunteer practising certificates that has the following key features:

3.5.1 holders of volunteer practising certificates should be allowed to engage in legal practice only as a volunteer:

- at a Community Legal Centre and/or,
- on pro bono projects approved by the APBC (formerly the National Pro Bono Resource Centre);

3.5.2 holders of volunteer practising certificates should be subject to mandatory continuing professional development requirements so as to preserve the reputation and high standards of the legal profession;

3.5.3 volunteer practising certificates should also be available to practitioners who have not completed supervised practise within the meaning of rule 3 of the LPEAC rules.⁶

3.6. While we appreciate that the practising certificate fees are a matter for regulation, JusticeNet also proposes that volunteer practising certificates should be available at no cost to the holder.

3.7. Overall, JusticeNet's proposal most closely aligns with the Queensland scheme, which we submit is the most comprehensive, effective and administratively straightforward of all existing state schemes.

4. THE COST OF VOLUNTEER PRACTISING CERTIFICATES

4.1. We understand that the Attorney-General is considering an annual fee for a volunteer practising certificate of around \$100 to \$150. While this is less than the \$585 fee that would otherwise apply (in 2015/16), it is not insignificant and JusticeNet considers that it would be a disincentive and barrier to those seeking to provide pro bono legal services to disadvantaged South Australians.

⁶ Rule 3, Rules of the Legal Practitioners Education and Admission Council 2004.



- 4.2. JusticeNet submits that volunteer practising certificates should be free because:
- 4.2.1 the preferred goal ought be to remove fiscal barriers to the provision of pro bono legal services;
 - 4.2.2 it would be consistent with the recommendation of the Productivity Commission in the recent Report into Access to Justice Arrangements:

“Further, those State and Territory Governments that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a community legal centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.”⁷
 - 4.2.3 it would be consistent with the approach taken by all other Australian states that offer volunteer practising certificates;
 - 4.2.4 having to comply with mandatory CPD requirements would already impose significant financial and time costs on holders of volunteer practising certificates;
 - 4.2.5 it would signal the continuing commitment of the legal profession to promoting pro bono;
 - 4.2.6 it more closely aligns with the themes and goals of the Volunteering Strategy for South Australia and the South Australian Strategic Plan, to increase volunteering participation and remove barriers to volunteering.
- 4.3. To the extent that there may be concerns about the potential loss of revenue associated with the introduction of free volunteer practising certificate, we would respond as follows:
- 4.3.1 JusticeNet envisages that people who apply for volunteer practising certificates will not otherwise be intending to acquire a practising certificate. For example, they may be lawyers employed

⁷ Australian Government Productivity Commission, Commonwealth of Australia, *Access to Justice Arrangements Productivity Commission Inquiry Report* (2014) p 829



by agencies such as the Australian Government Solicitor (AGS), who are not required to hold practising certificates so long as they act in that capacity, or retired lawyers or lawyers on a 'career break' who would not practise law except as a volunteer. In summary, we submit that there would be no opportunity cost (arising from fees foregone) of creating free volunteer practising certificates.

- 4.3.2 In fact, the creation of free volunteer practising certificates would create a new (albeit relatively modest) revenue stream for mandatory professional development providers such as the Law Society of South Australia and others.

5. THE SCOPE OF VOLUNTEER WORK

- 5.1. JusticeNet considers that holders of volunteer practising certificates should only be allowed to practise law:
- as a volunteer at a Community Legal Centre (as defined in s 5 of the LPA); or
 - as volunteer for a pro bono project approved by the APBC.
- 5.2. Limiting the availability of volunteer practising certificates to lawyers volunteering at CLCs would, in our view, be unnecessarily restrictive and a missed opportunity. For example, such a scheme would not allow for government, retired or career-break lawyers to undertake pro bono legal work other than at a CLC.
- 5.3. Allowing holders of volunteer practising certificates to work on projects approved by the APBC would provide more opportunities for undertaking pro bono work, while ensuring the integrity of the practising certificate system. The APBC approves a pro bono project if the work falls within the definition of pro bono used by the Law Council of Australia and is to be undertaken without fee to the client. Volunteers on APBC pro bono projects are also covered by the National Pro Bono Professional Indemnity Insurance Scheme arranged by the APBC, while volunteer lawyers at CLCs are generally covered under the National Association of Community Legal Centres professional indemnity insurance scheme.
- 5.4. The comments of the Productivity Commission about the merits of the Queensland approach to volunteer practising certificates are worth repeating in this context:



Given that it further extends the opportunities for pro bono provision, while still maintaining a degree of oversight, the Commission considers that the Queensland system provides the best model for jurisdictions to adopt. In relation to fidelity and indemnity insurance, the Commission notes that CLCs' fidelity insurance generally covers volunteers, and the professional indemnity insurance cover provided by the NPBRC appears to be appropriate...⁸

6. ELIGIBILITY FOR A VOLUNTEER PRACTISING CERTIFICATE

- 6.1. JusticeNet submits that volunteer practising certificates should also be available to practitioners who have not completed supervised practise within the meaning of rule 3 of the LPEAC rules.⁹
- 6.2. Importantly, there would be no risk that volunteer practising certificates are used by new practitioners to complete the supervised practice requirements within the meaning of the LPEAC rules. Only time spent as an employee qualifies as supervised practice within the meaning of the rules. Accordingly, using a volunteer practising certificate to provide legal services as a volunteer at a CLC or on an APBC approved pro bono project cannot count toward the supervised practise requirements.¹⁰
- 6.3. Newer practitioners should be eligible for a volunteer practising certificates for the following reasons:
 - 6.3.1 younger practitioners are particularly active in participating in volunteer and pro bono opportunities;
 - 6.3.2 it would encourage newer practitioners to volunteer either at a CLC or for an APBC approved pro bono project;
 - 6.3.3 it would enable newer lawyers to obtain more practical legal experience, particularly at the current time when the market for graduate solicitors is very tight.

⁸ Australian Government Productivity Commission, Commonwealth of Australia, *Access to Justice Arrangements Productivity Commission Inquiry Report* (2014) p 829

⁹ Rule 3, Rules of the Legal Practitioners Education and Admission Council 2004.

¹⁰ Theoretically, holders of volunteer practising certificates may be employed in a different capacity (for example, an AGS lawyer authorised to participate in an approved APBC project), but the work done pursuant to a volunteer practising certificate would not count towards his or her supervised practice requirements.)



- 6.4. We note that the Queensland scheme allows for practitioners who are only entitled to engage in supervised legal practice, to hold a volunteer practising certificate.
- 6.5. In the call for submissions dated 29 May 2015, comment was sought on the proposal of extending volunteer practising certificates to University staff who are engaged as supervising solicitors for legal assistance clinics which involve university law students. JusticeNet does not consider that such university staff members should be eligible to practise law under a volunteer practising certificate because, presumably, any legal practice is undertaken in the course of their paid employment. Accordingly, they are not 'volunteers' although they assist in the provision of pro bono legal services. JusticeNet's view is that costs associated with those university staff members' practising certificates would be most appropriately met by universities themselves.

7. JUSTICENET'S RECOMMENDATION AND CONCLUSION

- 7.1. In summary, JusticeNet welcomes LPEAC's consideration of the Attorney-General's proposal, and supports the proposal, subject to the additional submissions outlined above.
- 7.2. JusticeNet would welcome the opportunity to answer any questions you may have or otherwise assist LPEAC to implement a scheme for volunteer practising certificates in South Australia.
- 7.3. Please contact me if you require any further information.

Tim Graham
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